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SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 80-2151

STATE OF NEW JERSEY, Petitioner

-v-

EDWARD RYAN, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

BRIEF IN OPPOSITION

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Of Counsel and
On the Brief

THE NATURE OF THE CASE

The New Jersey Attorney General's Office argues that the Double Jeopardy Clause of the Fifth Amendment does not prevent the imposition of an increased term of imprisonment subsequent to and during the execution of the original sentence of imprisonment.

STATEMENT OF THE CASE

As a result of the entry of retraxit pleas of guilty to two Monmouth County Indictments (Nos. 1388-72 and 1389-72) and one Accusation (No. A-253-72) charging him in five counts with breaking and entering with intent to steal and three counts of larceny, on January 4, 1974, Mr. Ryan was sentenced by the Honorable Alton V. Evans, J.S.C., to the New Jersey State Prison for concurrent terms, the longest being three to five years. Six months later, on July 2, 1974, Mr. Ryan was granted a motion for transfer to a drug treatment program pursuant to R. 3:21-10(b), which was to become effective on August 1, 1974, after Mr. Ryan had served some seven months in custody on the sentences imposed. The Court order further provided that the originally imposed sentences be suspended, and that defendant enter a narcotic treatment program and remain on probation for a period of two years.

On February 25, 1977, having pled guilty to two of three charges of violating probation and pursuant to N.J.S.A. 2A:168-4, the Honorable Thomas L Yaccarino, J.S.C., sentenced Mr. Ryan to various concurrent sentences of five to seven and two to three years, respectively, for the crimes charged in the original indictments and accusation. Thus, at this resentencing Mr. Ryan received a sentence which, in aggregate is two years greater than the sentence originally imposed.

On appeal to the Appellate Division Mr. Ryan contended that the imposition of a greater sentence after execution of his original sentence had begun--contravened the double jeopardy clauses of the United States Constitution[1] and the Constitution of New Jersey.[2] In addition he

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1. U.S. Const., Amend. V.

2. N.J. Const., Art. I, par. 11 (1947).

contended that the history surrounding the promulgation of R. 3:21-10(b) supported his contention that if an offender violates probation received pursuant to the grant of a R. 3:21-10(b) motion, he can only be returned to prison to serve the reminder of his term.

On December 4, 1979, in an unanimous opinion the Appellate Division affirmed Mr. Ryan's convictions. Relying primarily upon State v. Cunningham, 143 N.J. Super. 415 (App. Div. 1976), the Appellate Division concluded that traditional principles of double jeopardy are inapplicable when an offender is resentenced for violation of probation, even when probation is imposed subsequent to execution of a prison term. State v. Edward Ryan, unpub. opinion, App. Div., Docket No. A-2843-76 (1979), appended hereto as Pa3 to Pa17, Pa6 to 11. In reaching this decision the appellate court suggested that defendant's increased sentence was proper because he had initiated the proceeding by which probation was granted, and further than his violation per se justified upward revision of his sentence. Id. at Pa5 and Pa8.

A Notice of Petition for Certification was filed in this matter on December 24, 1979.

On April 20, 1981, the New Jersey Supreme Court reversed the decision of the Appellate Division, vacated the increased term of five to seven years and reinstated the original sentence of three to five years. The New Jersey Supreme Court held that double jeopardy considerations militate against increasing a defendant's prison sentence after violation of probation when he has already served a portion of that custodial term. The court distinguished United States v. DiFrancesco, 449 U.S. ___, 66 L. Ed. 2d 328 (1980) as not addressing the issue of partial execution of sentence. The New Jersey Supreme Court further distinguished DiFrancesco by noting that, unlike the defendant in DiFrancesco, respondent here had no reason to expect that his sentence was not final at the time it was imposed and his imprisonment began.

In a dissenting opinion, Justice Sidney Schreiber found that application of the facts and holding of DiFrancesco to the factual pattern of the instant matter indicated the absence of a double jeopardy obstacle. Justice Schreiber argued that the pronouncement of sentence has never carried the finality that attaches to a judgment of acquittal, particularly where the State legislature has removed any expectation of finality by providing for an increased term of imprisonment following a violation of probation.

On May 4, 1981, petitioner moved in the New Jersey Supreme Court for a stay of judgment pending the filing of a petition for certiorari to this Court. On May 20, 1981, petitioner's motion for a stay pending determination of its petition for certioari to this Court was granted. (A40).

The State of New Jersey now petitions this Court for a writ of certioari to review the decision of the New Jersey Supreme Court.

REASON FOR DENYING WRIT

THE STATE OF NEW JERSEY'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION OVER THE SUBJECT MATTER

The State of New Jersey in its petition for certiorari invokes this Court's jurisdiction by way of 28 U.S.C. Section 1257(3). The State of New Jersey argues that the New Jersey Supreme Court in its opinion below improperly concluded that New Jersey probation statutes, and their legislative history, did not apply to the procedure which resulted in Mr. Ryan's increased sentence.[3] This Court has held on numerous occasions that it is "bound to accept the interpretations of (state law) by the highest court of the State." Hortonville Dist. v. Hortonville Ed. Assn., 426 U.S. 482 (1976); Groppi v. Wisconsin, 400 U.S. 505 (1971); Garner v. Louisianna, 368 U.S. 157 (1961), Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). In order to show the error of petitioner's argument it is necessary to give a brief review of the matter below.

In examining the opinion below there can be no question that the lynchpin of the decision is the Court's examination first of state statutes and second defendant's conduct. Having concluded that no applicable

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3. The State of New Jersey further argues in footnote No. 4, petitioner's brief pg. 14, that as a result of this misinterpretation of state law the New Jersey Supreme Court has rendered unconstitutional, in part, two New Jersey statutes (one of these statutes was not even in existence at the time of the incident). However, the State of New Jersey is not attempting to invoke this Court's jurisdiction under 28 U.S.C.A. 1257(2).

state statute existed and that defendant's conduct did not constitute a form of voluntary waiver the New Jersey Supreme Court then addressed the issue of double jeopardy.[4]

The New Jersey Supreme Court in reversing the trial court's increase of Mr. Ryan's original sentence and the New Jersey Appellate Division affirmance of that action held;

> "...that jeopardy attached as soon as defendant commenced serving his prison term, hence principles of double jeopardy foreclose the imposition of any increased term after violation of probation." State v. Ryan, ___ N.J. ___ at ___. (Pa8a).

Although there is no holding by this Court directly on point there can be no question that this holding is in full accord with a long line of double jeopardy cases beginning with Ex parte Lange, 85 U.S. (18 Wall.) 163 (1974) and ending with United States v. DiFrancesco, 499 U.S. ___, 66 L. Ed. 2d 328 (1980) and Bullington v. Missouri, ___ U.S. ___, 49 U.S.L.W. 4481 (1981). In Ex parte Lange, supra at 173 the Court observed

> "If after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment... is the constitutional restriction (against double jeopardy) of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?"

Having posed the question this Court resolved it with the following comment

> "...we do not doubt that the constitution was designed as much to prevent the

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4. Petitioner's brief seems to be under the mistaken belief that the N.J.S.C. first decided the double jeopardy question and then the statutory issues. Their confusion can be explained in part by the structure of the opinion below in which, because of the thrust of the dissenting opinion, the majority felt it necessary to address the double jeopardy issue at greater length.

> criminal from being twice punished for the same offense as from being twice tried for it." Ex parte Lange, supra, at 173.

This Court again addressed the issue of multiple punishment in United States v. Benz, 282 U.S. 304, 307-8 (1931) wherein it reaffirmed the holding in Ex parte Lange.[5] Although the rule of both Ex parte Lange and Benz was held to be limited to their specific facts in United States v. DeFrancisco, ___ U.S.___ at ___, 66 L. Ed. 2d 328 at 347 (1981) it is clear from the following comment by Justice Blackman that the prohibition against multiple punishment still remains.

> "This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve his sentence. (Cites omitted)." DeFrancisco, supra at 344.

The New Jersey Supreme Court relying on this Court's prior holdings concluded the following: once a sentence is imposed and execution is begun, absent statutory authority for appealing or increasing it, or the voluntary action of the defendant, the defendant has a reasonable expectation[6] that it is a final sentence.[7] It is the doctrine of finality upon which prior dictum as well as the New Jersey Supreme Court's ruling

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5. In Benton v. Maryland, 395 U.S. 784, 796 (1969) this Court held that the double jeopardy restrictions in the Fifth Amendment were applicable to the states.

6. Reasonable expectation is a factual question which is resolved by first determining if a statutory authority exists which allows the State to request that the court modify defendant's sentence (the existence of said statutory authority would place defendant on notice as to the non-final nature of his sentence) and second an evaluation of defendant's conduct to determine if he has voluntarily placed himself in a position which results in the waiver of any double jeopardy argument (i.e., motion for mistrial or appeal of conviction).

7. Finality can be described as that point in time when statutes and/or court rules, which have given notice to the defendant of the states right to request modification of defendant's current sentence, have lapsed and thereby absent a voluntary action by the defendant, no increase in sentence can be made.

relies. The New Jersey Supreme Court distinguished United States v. DeFrancisco, supra, with the following comment,

> "The issue in DeFrancisco, was stated in this fashion: '(o)ur task is to determine whether a criminal sentence, once pronounced is to be accorded constitutional finality and conclusiveness similar to that attached to a jury's verdict of acquittal.' Id. at ___, 66 L. Ed. 2d at 343 (emphasis added). The instant case is concerned with whether a criminal sentence is entitled to finality once defendant has begun to serve it. Our holding is that in the latter circumstances ejopardy attaches once the defendant has commenced serving his prison term."

State v. Ryan, ___ N.J. ___ (at Pal0a). In analyzing Mr. Ryan's expectation of finality the New Jersey Supreme Court noted,

> "...the defendant had no reason to expect that his original sentence was not final at the time it was imposed and his imprisonment began. When he subsequently moved for sentence modification under R. 3:21-10(b), the defendant was seeking special, more lenient treatment subject to certain conditions. Thus, the defendant was on notice that a 'breach of those conditions may result in revocation of the beneficial treatment; but, given the finality of his original sentence, he would expect, at the very worse (that) the original sentence may be reinstated.' DiFrancesco, supra, at ___, 66 L. Ed. 2d at 353 (Brennan, J. dissenting)."

Ryan, supra at (Palla).

In concluding its opinion the court directly addressed the question of whether Mr. Ryan's action, the filing of the motion for transfer to a drug treatment program, had in some way waived[8] his double jeopardy rights or his reasonable expectation in the finality of his sentence.

> "Finally, we address the State's contention, adopted by the Appellate Division, that when a defendant by his own motion has his original sentence set aside, the constitutional guarantee against double jeopardy does not restrict the imposition of whatever sentence may be legally authorized, even though it may be greater than the original sentence imposed. On the strength of North Carolina v. Pearce, supra, the court below attempted to apply to the instant matter the principle derived from that case that a more severe sentence upon reconviction is permitted when justified by defendant's subsequent conduct, absent any motive of retaliation for the taking of an appeal. See Pearce, supra, 395 U.S. at 723-26, 23 L. Ed. 2d at 668-70. Proceeding by way of analogy the Appellate Division concluded that "a sentence imposed after probation has been violated can reflect the added basis for evaluating defendant's amenability to reform, namely, his response to probation." 171 N.J. Super. at 436.
>
> "There can be no doubt that defendant's subsequent conduct is an appropriate concern at the time of sentencing after reconviction. But the linchpin of Pearce's analysis is the premise that
>
> 'the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. *** (S)o far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate has been wiped clean. The conviction has been set aside, and the unexpired portion of the original sentence will never be served.'

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8. There can be no question that the record below is totally silent as to the potential consequences of defendant's motion. Therefore, it is irrelevant whether one applies a waiver test as set forth in Johnson v. Zerbst, 304 U.S. 458 (1938), or a voluntary action test as set forth in United States v. Jones, 437 U.S. 82 (1978).

(395 U.S. at 721, 23 L. Ed. 2d at 667 (emphasis in original).)

> "Here, Ryan has not attacked his original conviction. His R. 3:21-10(b) motion sought only a modification of sentence, not a new trial. The granting of that motion resulted only in a suspension of the execution of his original sentence pending successful completion of the drug rehabilitation program and probationary term, not in a vacation or annullment of that sentence. In effect the sentence became temporarily and conditionally inoperative. Under the circumstances there was no impairment of the jeopardy that attached at the execution of the sentence. The slate was not "wiped clean" within the meaning of Pearce."

It is clear from the above that the New Jersey Supreme Court in resinstating Mr. Ryan's original sentence was making several conclusions as to both fact and law.

> 1. The Court found as a matter of state law that no state statute gave authority to the trial court to increase defendant's sentence.
>
> 2. Mr. Ryan's motion for transfer to a drug treatment program was not an act which in itself would subject him to a potentially greater sentence. The Court decided that because of the lack of record below it would not presume a voluntary waiver by defendant.
>
> 3. The Court having concluded that no waiver existed and that the court's actions were not based upon specific statutory authority held that the double jeopardy provision of the United States Constitution prevents an increase in defendant's sentence once execution has begun.

The fatal flaw in the New Jersey Attorney General's writ is that it is asking this Court to disregard and overrule the New Jersey Supreme Court conclusion as to the current status of New Jersey statutory law and find that a specific New Jersey statutes exists which would justify the action taken by the trial court. As stated earlier, there can be no question than when the highest court of a state speaks on questions of

existing state law and its meaning this Court must yield to their opinions.

CONCLUSION

The New Jersey Supreme Court having concluded, based upon its analysis of this Court's holding in DiFrancesco, supra, that the Double Jeopardy Clause of the United States Constitution prohibits the State from increasing a defendant's sentence, once he has begun serving it, unless the State can show specific statutory authority or the voluntary action of defendant.

In deciding the case below the New Jersey Supreme Court found that,

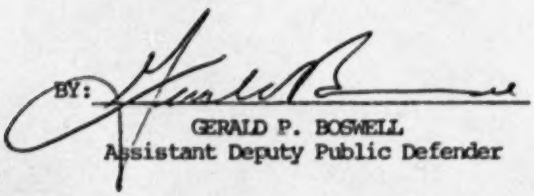
1. No statutory authority existed for increasing defendant's sentence.

2. Defendant's filing of a motion for transfer to a drug treatment program was not a waiver of his double jeopardy arguments.

As a result of their factual findings, based solely on New Jersey law, this Court is without jurisdiction to review the finding of New Jersey's highest court.

Respectfully submitted,

STANLEY C. VAN NESS
Public Defender
Attorney for Defendant-Petitioner

BY: 

GERALD P. BOSWELL
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-v-

EDWARD RYAN, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Edward Ryan, asks leave to file the attached Brief in Opposition to a Write of Certiorari to the Supreme Court of New Jersey, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Counsel for Respondent's affidavit in support of this motion is attached hereto.

STANLEY C. VAN NESS
Public Defender of New Jersey

BY: Gerald P. Boswell
GERALD P. BOSWELL
Assistant Deputy Public Defender

Counsel for Petitioner

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AFFIDAVIT

I, GERALD P. BOSWELL, Assistant Deputy Public Defender, counsel for respondent Edward Ryan, being first duly sworn, according to law, depose and says, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am counsel for respondent Edward Ryan in the above-entitled case.

2. Respondent Edward Ryan has been found to be an indigent by the New Jersey Office of the Public Defender.

3. Mr. Ryan has been represented by the Office of the Public Defender at all stages of this matter.

4. Mr. Ryan appears before this Court as respondent to a Petition for Writ of Certiorari filed by the New Jersey Office of the Attorney General.

5. As counsel for Mr. Ryan I believe that he is entitled to proceed In Forma Pauperis so as to oppose the New Jersey Attorney General Petition

for a Writ of Certiorari.

GERALD P. BOSWELL
Attorney for Edward Ryan, Respondent

Sworn to and subscribed to
before me on this 15th
day of July, 1981.

Attorney-at-Law of the
State of New Jersey

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1981, one copy each of the Motion for Leave to Proceed in Forma Pauperis, Affidavit in Support thereof, and Brief in Opposition to a Writ of Certiorari were mailed, postage prepaid, to James R. Zazzali, Esq., Attorney General of New Jersey, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

GERALD P. BOSWELL
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Office of the Public Defender
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Counsel for Petitioner

July 15, 1981

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